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CASES AND MATERIALS ON TRUSTS

2001 - 02

VOLUME I

EXPRESS TRUSTS

Professor R.E. Scane

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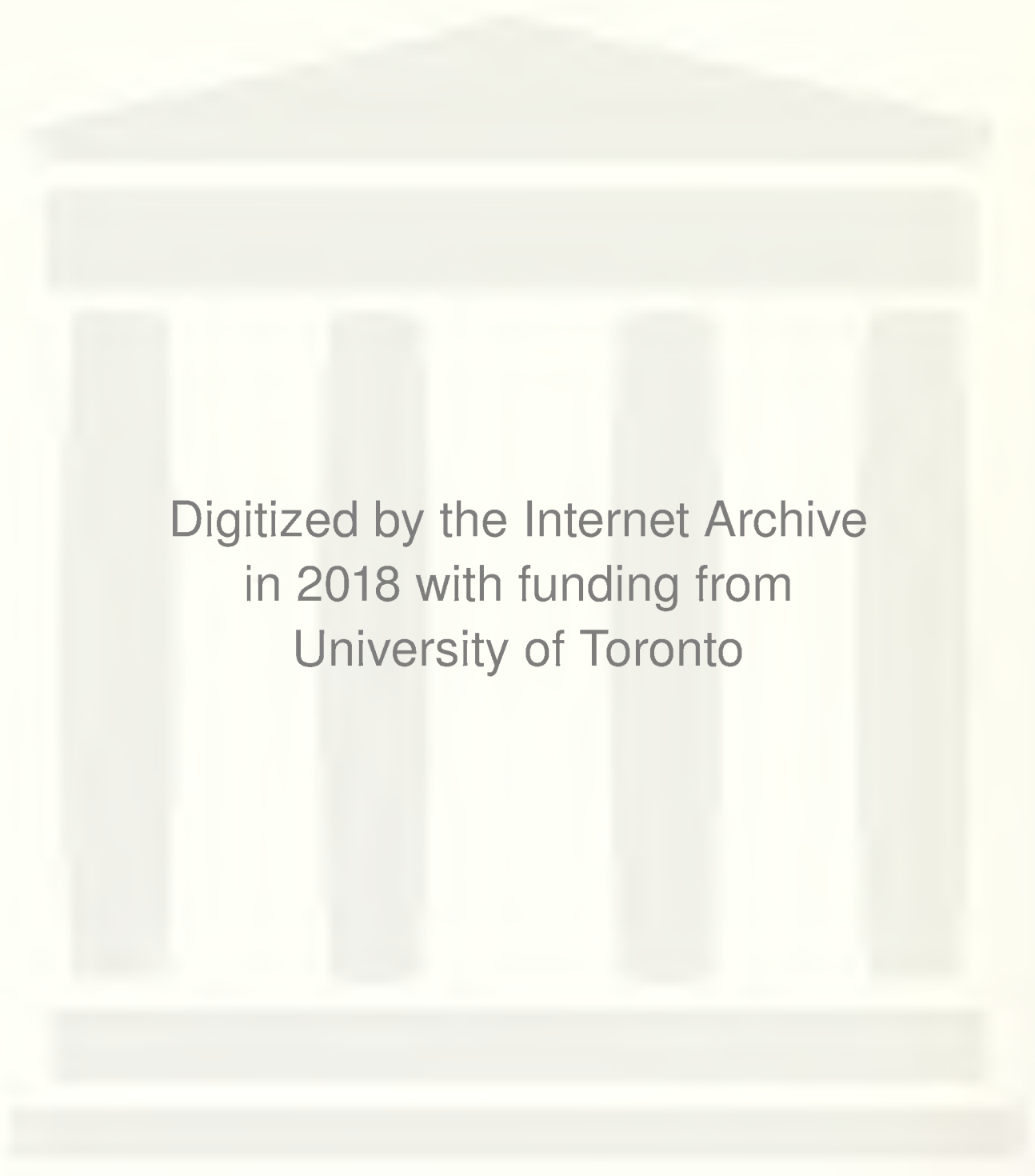
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PART I - THE DEVELOPMENT AND NATURE OF THE TRUST

CHAPTER 1 - HISTORICAL INTRODUCTION

NOTE ON THE GROWTH OF THE "USE" IN EARLY ENGLISH LAW, AND ON ITS EVOLUTION INTO THE MODERN TRUST.

The first of the historical developments which gave rise to the modern trust was the introduction into and development within England of a mysterious institution known as the "use". The mode of introduction is still the subject of study by historians, but it was probably known at least as early as the 13th century, when it was employed to circumvent the vows of personal and communal poverty taken by certain religious orders. In a society where the important source of wealth flow was land, a religious organization which was debarred from ownership or control of land in its own right would face serious difficulties in sustaining itself and its works. The device grew up of having land, which was really intended as part of the endowment of a religious order, held by some sympathetic secular landowner "to the use" of the order. Since the title to the land was in the secular person, the order had not broken its obligation not to hold property. Nevertheless, the understanding was that the person who held the legal ownership would allow the order to enjoy the fruits of that ownership.

The simplicity and effectiveness of this idea apparently quickly attracted the imagination of English landowning society, and was adapted to serve a multitude of particular needs. Land was the important source of wealth, and the feudal system was in full effect. Among its other attributes, that feudal system exacted from tenants in the feudal chain various types of payments to their immediate landlords. We might think of these, in a modern context, as a taxation system, and with respect to some of the more onerous of these imposts, as equivalent to a system of death taxes. Further, the land was held in the grip of the doctrine of primogeniture. The owner of land was thus unable to make a will should he or she desire the land to descend other than to the person designated as the heir at common law. Finally, the times were politically turbulent, particularly as the Wars of the Roses developed, and landowners who found themselves on the losing side of a dynastic struggle risked losing their estates by forfeiture for treason. The device of the use proved remarkably adaptable in dealing with these factors. By conveying away lands to another person to hold for the use of the conveyor or a third party, it was possible to work out techniques which would avoid, or at least substantially defer the impact of many feudal dues. Through the development of more sophisticated uses, analogous to future interests in land, of the nature of life estates and remainders, it was possible to circumvent substantially the inability to make a will governing descent of lands. (Essentially, the grantor would grant his or her lands to a grantee to hold the lands to the use of the grantor for life and after the death of the grantor, to the use of some person other than the heir. Then, as the grantor no longer "owned" those lands at death, they were simply not in his or her estate to descend to the common law heir). Similarly, a landowner embarking upon the dangerous political seas of the times could convey his or her lands to a grantee, either to the use of the grantor or to the use of the grantor and ultimately other members of the grantor's family, so that, should he or she end up on the losing side, those lands were not in the estate to be forfeited.

Pausing at this point, it is interesting to note that the genesis of the modern trust lies in its utility for evading fiscal obligations, or other adverse consequences which the law would impose upon ownership, by placing the realities of ownership other than where they appear to be on the surface of the legal title. One not infrequently hears modern trust lawyers bemoaning the fact that the revenue authorities frequently seem to assume that all trusts are set up for the sole purpose of removing property from their grasp. Whatever truth might underlie such suspicion today, they are at least consistent with one of the original reasons for being of the forerunner of the modern institution.

Next, let us look at the conventional understandings which grew up as to the implications of the concept that one person was holding an estate in land to the benefit or use of another person. Although, as the institution evolved, the intentions could be expressly elaborated, at its roots, the concept of holding land to uses involved three basic ideas. First, the person for whose benefit the land was held to uses, rather than the actual owner of the legal title to the land, was entitled to receive the rents and profits. Second, although the owner of the legally recognized estate in land was the only person with power to dispose of or alienate that land, so far as the legal system was concerned, that power of disposition would be exercised only at the direction of the person to whose use the land was held. Third, the holder of the legally recognized estate, whose interests were the only ones recognized by the courts, would, if necessary, make use of that recognized status to invoke the aid of the courts in protecting the land against trespassers or those who sought to establish an adverse title. If we look at these three basic understandings as an entity, we see that indirectly, the person for whose benefit the land was held to uses had all of the essentials of proprietary ownership: the right to income derived from the capital; the right to control the disposition of the capital, and the right to have the capital protected by the organs of the state against those who would wrongfully try to deprive him or her of it. All that the legally recognized owner had left of the legally recognized interest in land was the bare husk of title. The kernel belonged to the beneficiary of the use. At this stage, we have evolved the idea of the separation between legal and equitable ownership of property, although we have yet to introduce it into the legal structure of the country.

Because of its utility, the institution of the use apparently spread widely across England, and indeed, Sir Edward Coke, in his famous Treatise, was able to assert that by the time of the Reign of Henry V, early in the 15th century, the greater part of lands in England were held to uses. If so, this is an amazing social phenomenon, for during this period, there was no state-sanctioned mechanism to enforce the interests of the person to whose use the land was held. The courts of common law recognized only the owner of the title as having rights in or to the land and its fruits. The basic understandings upon which that owner held the land for the benefit of another were neither recognized nor enforceable. They rested entirely on the honour of the holder of the legally recognized title, and if the understood obligations were not carried out, the person who was to have the benefit of the use had no recourse in the courts of the country. Presumably, there was some form of social sanction which had some degree of effectiveness, but so far as the established legal system was concerned, the beneficiary of the use had no forum to enforce his or her rights. This is not to say that the legal system completely ignored the institution, for from time to time, Parliament intervened on an *ad hoc* basis to counteract certain of the more offensive purposes for which the device was employed,

such as the granting of one's land to another to hold to the use of oneself, in order to shelter it from creditors. In general, though, in its early formative period, the institution grew and flourished outside the established legal system.

Early in the 15th century, we see the interaction of this conventionally developed institution of the use with another major historical development, which will result in bringing the use into the legal system of the country, as the modern trust. That other development was the growth of function and power of the Lord Chancellor. This led to the development of the Court of Chancery, and the particular body of jurisprudence, Equity, which that Court administered, in supplementation of the existing law administered in the common law courts.

Again reaching back as far as the 13th century, we find the common law courts entering into a stage of inflexibility, as they perceived themselves as having jurisdiction to grant a remedy only if a known form of action existed which applied in the particular circumstances. As the known forms of action were relatively few, subjects increasingly felt themselves aggrieved with respect to matters which did not fall within the recognized remedial procedures. One recourse was to apply to the Crown for intercession through some form of the royal prerogative to dispense justice. These petitions were usually routed through to the King's Council, and ultimately through to the Lord Chancellor, one of the King's chief ministers. The Chancellors gradually started adjudicating these petitions on a very much *ad hoc* basis. The early Chancellors were not lawyers, but ecclesiastics. The first lawyer to hold the post, Sir Thomas More, did not assume the office until 1529. As ecclesiastics, untrained in the common law, although probably familiar with civil and canon law, the Chancellors saw their role as one of deciding each case on the basis of what would be the conscionable result, rather than on the basis of the application of an understood body of rules. In proceeding to exercise this growing jurisdiction, the Chancellors developed the practice of issuing a subpoena to a person of whose conduct the petitioner had complained, ordering that person to appear before the Chancellor and answer the complaint upon oath. Where the Chancellor considered that the complaint was made out, and that the granting of a remedy was justified, the remedy took the form of an order to the person complained against to bring to an end the state of things which the Chancellor considered unconscionable. Essentially, this would be accomplished by directing the defendant either to do something, or to refrain from doing something. These orders were backed by the power to punish for contempt. This system gradually developed until, at least by the early 15th century, Chancery had developed into a recognized court, separate and apart from the established courts of common law, although still without any really systematized body of jurisprudence.

It was at about this time, the early 15th century, that the two great historical developments interacted. Apparently there had been a lengthy history of persons, who were supposed to have the benefit of uses declared on lands, who complained that the holder of the legally recognized title to the land had not carried out the understandings upon which the land had been granted to him or her. Eventually, the Chancellors responded to these petitions. They invoked their developing jurisprudence of conscience, and ordered the holders of the legally recognized title to land to honour the understandings upon which they had received it, that is, to honour their obligations to the person to whose use the land was held, upon pain of punishment through contempt proceedings. At this point, the institution which we now know

as the trust comes into the legal system of England. Now, the owner of the beneficial interest in the use can invoke the sanctions of the state to protect his interests.

There is only one more step which we need note to complete the picture, for the purposes of this brief introduction. Note that the rights of the beneficiary of the use against the holder of the legally recognized title to land are of a personal nature. That is, the beneficiary has no proprietary right in the land itself, but only a personal right, enforceable through the intervention of Chancery, to compel the holder of the legally recognized title to behave, or cease from behaving, in a given fashion. As between these two persons, as has previously been pointed out, this gave the realities of ownership to the beneficiary of the use, leaving only the shell of legal title in the title holder. As against the rest of the world, however, the legally recognized title holder had all of the rights which accompanied his or her proprietary interest. The next step, which appears to have been completed by the end of the 15th century, was to hold that, just as it was unconscionable for the person who had originally received the legally recognized title, on the understanding that he or she would hold it to the use of some other person, to act contrary to that understanding, so it was equally unconscionable for anyone to whom the title of that legally recognized title holder was subsequently transferred to accept the transfer of that title without honouring those same understandings or obligations.

There was one exception recognized to this general proposition. It was considered that where a person had bought a legal title for value, without notice of the obligations imposed upon his predecessor in title by the use, it was not unconscionable for the successor to utilize the land for his or her own sole benefit, free of any obligations to the beneficiary of the original use. Here we have the origin of the Darling of Equity, the famous *bona fide* purchaser for value of the legal estate without notice, against whom no claim in Equity will ever prevail. With respect to any other transferee, however, the original obligations undertaken continue. For practical purposes, these may be regarded as a form of burden on the legally recognized title to the land, running with that land into the hands of all successors, except, of course, the *bona fide* purchaser for value of the legal estate without notice of that pre-existing interest which would otherwise be recognized and enforced by Equity. By this means, what started out, conceptually, as a purely personal right of action in Equity between the beneficiary of the use and the holder of the legal title, appears to be transmuted into an interest which has many of the important characteristics of an *in rem* right in the land itself. This, in turn, is the foundation of that famous distinction between legal and equitable ownership which so confounds those persons trained in other legal systems.

The story of the evolution of the trust does not end here, of course. By analogy, the idea of enforceable uses was extended to personal property. Interests in the use became assignable, and transmissible on death. Proprietary interests in the use were gradually shaped, with some analogy to the existing proprietary interests recognized by law in the land itself. As the analogy was not complete, however, equitable interests acquired a flexibility which the common law has never permitted for the interests it created in the land itself.

R.S.O. 1897, CHAPTER 331

An Act concerning Uses

[R.S.O. 1980, Appendix A]

2. Where any person stands or is seized of and in lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence or trust, of any other person, or of any body politic, by reason of any bargain, sale, feoffment, covenant, contract, agreement, will, or otherwise, by any means whatsoever it be, in every such case such person and body politic that shall have any such use, confidence or trust, in fee simple, fee tail, for term of life, or for years, or otherwise, or any use, confidence or trust, in remainder or reversion, shall from henceforth stand and be seized, deemed and adjudged in lawful seizin, estate and possession of and in the same lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions and purposes in the law, of and in such like estates as they had, or shall have, in use, trust or confidence, of or in the same. And the estate, right, title and possession, that was in such person that was, or shall be hereafter seized, of any lands, tenements, or hereditaments, to the use, confidence or trust, of any such person, or of any body politic, shall be from henceforth deemed and adjudged to be in him that hath such use, confidence or trust, after such quality, manner, form and condition, as he had before in or to the use, confidence or trust, that was in him. 27 Hen. VIII, c. 10, s. 1.

Persons
entitled to
the use of
lands, shall
stand and be
seized, and
be deemed
in lawful
seizin and
possession
of the lands.

